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IN THE COURT OF APPEALS OF INDIANA

PRESTON JAMES FRYE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 21A04-0801-CR-5
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FAYETTE CIRCUIT COURT
The Honorable Ronald Urdal, Judge
Cause No.21D01-0705-FD-349

October 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Preston Frye appeals his conviction and sentence for intimidation, a Class D felony. On appeal, Frye raises two issues, which we restate as 1) whether sufficient evidence supports Frye's conviction and 2) whether Frye's sentence is inappropriate in light of the nature of the offense and his character. Concluding that sufficient evidence supports Frye's conviction and that his sentence is not inappropriate, we affirm.

Facts and Procedural History

On April 26, 2007, slightly over one month after he been sentenced to four and one-half years of work release for Class D felony burglary with an habitual offender enhancement, Frye called his community corrections officer, Paul Maxie, from jail to ask why Maxie had removed him from work release. After Maxie explained there were "several reasons" for his removal, transcript at 28, including failure to report to jail promptly after his work shift, the following exchange occurred:

> [Maxie]: I don't want to argue about this, and I don't really care.
> [Frye]: Yeah, I didn't think you did care.
> [Maxie]: I don't really care.
> [Frye]: Well, fine. Thank you for not letting me see my baby being born.[1] Thank you.
> [Maxie]: Well, any time is good for me.
> [Frye]: And also thank you . . . I'm not paying my work release neither so . . .
> [Maxie]: You're going away to [the Indiana Department of Correction], so you don't have to worry about it.
> [Frye]: I don't give a fuck. I'd rather go to prison anyway than to punk with your fucking punk ass because you ain't nothin but a fucking two-faced lying mother fucker. You said that any time I called that you would let me out, or help me out in any[]way that you can.

[1] The record is not entirely clear, but apparently at an initial meeting with Frye, Maxie indicated he would give Frye the opportunity to see the birth of his child.

> [Maxie]: Oh, I'll help you out all right.
> [Frye]: Yeah, you did, mother fucker, the first day that I got the fuck out. When I went over there and signed the god-damn papers, that's when you told me, if I had any problems to call you. Yeah, I call you and what the fuck do you do? You belly bump, bump, bump, bump. That's what you fucking did.
> [Maxie]: I'll wait for you when you get out.
> [Frye]: Well, wait for me to get out, fuck, bond me out. Let me ask Dave to go to work, and we'll meet somewhere, mother fucker. You think I'm scared of you? Do you think I'm scared of you and your fucking kids? You think I'm scared of you or your hepatitis (inaudible) little grandkids? I ought to whip both of them like I done did before.
> [Maxie]: You have a nice little day.
> [Frye]: Yeah, I'll have a nice day. I'll see you in a year.

Id. at 29-30 (quotation marks omitted).

On May 2, 2007, the State charged Frye with intimidation, a Class D felony.[2] On June 22, 2007, the State amended its charging information, seeking a sentence enhancement based on Frye's alleged status as an habitual offender. On July 9 and 12, 2007, the trial court presided over a bifurcated jury trial. During the first phase, the jury heard testimony from Maxie and reviewed an audio recording of the telephone conversation between Frye and Maxie, after which it found Frye guilty of intimidation. Following the second phase, the jury found that Frye was an habitual offender. The trial court accepted the jury's verdict and habitual offender finding, entered a judgment of conviction, and sentenced Frye to three years, enhanced by four and one-half years based on the habitual offender finding. The trial court also ordered that Frye serve the entire seven and one-half years with the Indiana Department of Correction, except that the final ninety days be spent in a chemical dependency program. Frye now appeals.

[2] The State charged the offense as a Class D felony because it alleged Maxie was an employee of a community corrections program. See Ind. Code § 35-45-2-1(b)(1)(B)(viii).

Discussion and Decision

I. Sufficiency of the Evidence

Frye argues insufficient evidence supports his intimidation conviction. Our supreme court recently reiterated the standard of review to apply in examining a challenge to the sufficiency of the evidence:

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, footnote, and citations omitted) (emphasis in original).

To convict Frye of intimidation as a Class D felony, the State had to prove beyond a reasonable doubt that Frye communicated a threat to Maxie, an employee of a community corrections program, with the intent to place Maxie in fear of retaliation for a prior lawful act. See Ind. Code § 35-45-2-1(a)(2) and (b)(1)(B)(viii). Indiana Code section 35-45-2-1(c)(1) defines "threat" as "an expression, by words or action, of an intention to . . . unlawfully injure the person threatened or another person . . . ." Frye does not dispute he communicated threats when he told Maxie he would "meet [him] somewhere" (presumably to fight) or when he stated he "ought to whip" Maxie's children and grandchildren. Tr. at 30. Nor does Frye deny that he intended to place Maxie in fear

when he made these threats. Instead, Frye's sole argument is that he made these threats in response to a prior unlawful act, namely, Maxie's statement, "I'll wait for you when you get out." Id. Frye claims that this statement from Maxie was itself an act of intimidation.

We note initially that a reasonable juror could have interpreted Maxie's statement as an invitation to fight – think of a bar patron asking an adversary if he wanted to take their dispute "outside" – and that an invitation to fight certainly qualifies as a "threat" within the meaning of Indiana Code section 35-45-2-1(c). However, for a threat to be unlawful, it must rise to the level of intimidation. In this respect, Frye overlooks Maxie testified that he made the statement more out of indifference than out of an intention to place Frye in fear:

> [Prosecutor]: "What did you mean by . . . 'I'll wait for you when you get out?'"
> [Maxie]: "I mean, if he was going to beat me up, I would wait for him until he got out. If I was going to take a beating, I was going to take a beating."

Id. at 43. Coupling this explanation with Maxie's earlier testimony that he was frustrated with Frye's attempts to "put the blame on" him for having been removed from work release (in other words, Maxie was frustrated Frye had not realized his own conduct was the reason for removal), id. at 36, it becomes apparent that Maxie's statement – "I'll wait for you when you get out" – was merely an acknowledgement that he was fed up with Frye's excuses and did not want to argue anymore.[3] Viewed in this light, as we must, see

[3] That a reasonable jury could have concluded Maxie did not intend to put Frye in fear is further supported by the audio recording of Frye's call. Throughout most of the call, and particularly when he tells Frye he will wait for him, the tone of Maxie's voice suggests he is goading Frye. Although such behavior is unprofessional on Maxie's part, it nevertheless further supports an inference that Maxie did not intend to place Frye in fear.

Drane, 867 N.E.2d at 147, Maxie's statement can hardly be described as unlawful, and it therefore follows that sufficient evidence supports Frye's intimidation conviction.

II. Appropriateness of Sentence

Indiana appellate courts have authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). In determining whether a sentence is inappropriate, we examine both the nature of the offense and the character of the offender. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. However, "a defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The trial court sentenced Frye to three years, enhanced by four and one-half years based on the jury's habitual offender finding. Frye's resulting seven and one-half year sentence is both the statutory maximum sentence for a Class D felony, see Ind. Code § 35-50-2-7(a) ("A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one

and one-half (1 1/2) years."), as well as the statutory maximum sentence enhancement for a Class D felony, see Ind. Code § 35-50-2-8(h) (stating that the term of an habitual offender enhancement cannot exceed "more than three (3) times the advisory sentence for the underlying offense"). This court has observed that maximum sentences should be reserved for the worst offenses and offenders. See, e.g., Roney, 872 N.E.2d at 802; Haddock v. State, 800 N.E.2d 242, 248 (Ind. Ct. App. 2003). At the same time, however, reading this observation narrowly "would reserve the maximum punishment for only the single most heinous offense." Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied. Instead, a reviewing court "should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." Id. We therefore examine the nature of the offense and Frye's character with these observations in mind.

The nature of the offense is not the most egregious example of intimidation because, as noted above, the tone of Maxie's voice during the conversation suggests he was goading Frye. Cf. Ind. Code § 35-38-1-7.1(b)(5) (stating that the trial court may consider as a mitigating circumstance that the defendant "acted under strong provocation"). Frye's character, however, more than offsets the unremarkable nature of the offense. The trial court imposed the statutory maximum sentence based on Frye's "extensive record," appellant's appendix at 11, and it is worth explaining what the trial court meant by "extensive." In addition to four true findings as a juvenile, three of which would have been felonies had he not been a minor, Frye has accumulated five felony

convictions (three for receiving stolen property, one for burglary, and one for operating a vehicle as a habitual traffic violator) and numerous non-felony convictions, including two for resisting law enforcement, four for public intoxication, one for battery, one for disorderly conduct, and one for possession of marijuana. For Frye, who was twenty-nine at the time he committed the current offense, that is at least one conviction for every year since he has reached the age of majority. Although such a high number of convictions is sufficient to sustain the trial court's sentencing decision, cf. Prickett v. State, 856 N.E.2d 1203, 1209 (Ind. 2006) (explaining that the significance of a defendant's criminal history varies based on the gravity, nature, and number of prior offenses as related to the current offense), we also note that Frye committed the current offense while serving a sentence on work release. This provides additional negative commentary on Frye's character because it demonstrates his failure to take advantage of the leniency the trial court had extended to him. Cf. Ind. Code § 35-38-1-7.1(a)(6) (stating that the trial court may consider the defendant's recent violation of work release as an aggravating circumstance).

After due consideration of the trial court's decision and of the record, we conclude that Frye has not sustained his burden of establishing that his sentence, though the statutory maximum, is inappropriate in light of the nature of the offense and his character.

Conclusion

Sufficient evidence supports Frye's intimidation conviction, and Frye's sentence is not inappropriate in light of the nature of the offense and his character.

Affirmed.

Najam, J., and May J., concur.